requires the same for occupation by himself or any member of his family or any person for whom he holds the premises in trust, and —

(i) there has been no change by purchase in the ownership of the premises since the fifteenth day of February, 1942; or

(ii) the tenancy has been determined by not less than one year's notice to quit and there has been no change by purchase in the ownership of the premises within one year next preceding the date of such notice:

Provided that an order or judgment shall not be made or given on any ground specified in this paragraph if the court is satisfied that, having regard to all the circumstances of the case, including the question whether other accommodation is available for the owner or the tenant, greater hardship would be caused by granting an order or judgment than by refusing to grant it:

(n) in any case, whether falling within any of the preceding paragraphs or not, where the court considers it reasonable that such an order or judgment be made or given and is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order or judgment takes effect."

It should be mentioned at this stage that evidence was given at the hearing that by a new regulation the age of retirement for officers in Government service had been extended from 55 to 60 as a temporary measure. The plaintiff could therefore continue in Government service until he attained the age of 60 so long as the new regulation remained in force. There was no evidence whatsoever that Government had any intention of withdrawing the new regulation.

In making the order which he did, it is clear that the learned magistrate relied on two assumptions, one affecting the plaintiff and the other affecting the defendant.

As to the plaintiff, the learned magistrate made the following observations:—

"I say that the plaintiff had discharged the onus that he reasonably required the premises for himself because the court believed that the plaintiff had bought the house to reside there, though it could not believe that part of the story stating that he wanted to use the premises immediately.

Further, he is approaching the age of retirement and if the new regulation extending the age of retirement at the age of 60 years is withdrawn he would retire sooner and then he would certainly require the premises for himself since he would not be in a position to pay a high rental with the money he would be receiving by way of pension. It is to that foreseeable future that the court directed its mind when it gave judgment for possession after 30th November 1965."

With regard to the defendant, the learned magistrate said:—

"On the assumption, he would be forced to retire at the end of the year, he would require a minimum period of one year to get the money from the E.P.F. and build a house of his own. The defendant would then be able to move to the new premises with the minimum hardship to himself and his family. There would then be lesser hardship to the defendant than the plaintiff, for there would be security of tenancy and no problem of accommodation which may cause deterioration in his health. It is with these ideas in mind I gave order for eviction after 30th November 1965."

In his judgment, Ong J., after referring to the two assumptions and quoting two passages from the learned magistrate's grounds of judgment, expressed himself as follows:—

"I need hardly observe that the possibility of the landlord's retirement age being advanced is too remote to be foreseeable, nor is there on the part of the tenant, any evidence of his intention to retire if he can possibly help it. Consequently, and with reluctance, I am compelled to hold that the ground on which the issue of reasonableness rests is erroneous because such a conclusion was based on false premises."

I find myself in complete agreement with the observations of Ong J. It follows that, in my opinion, as the necessary element of reasonableness is absent in this case, no order for recovery of possession of the premises should have been made by the learned magistrate.

In the circumstances, it is in my view unnecessary to deal with the question of other accommodation or suitable alternative accommodation.

I would dismiss the appeal with costs.

Thomson L.P. and **Barakbah C.J. (Malaya)** concurred.

Appeal dismissed.

Solicitors: *Shook Lin & Bok; R. R. Chelliah.*

LEE BANG v. NADZRI

[O.C.J. (MacIntyre J.) May 31, 1965]

[Ipoh — Civil Suit No. 147 of 1964]

Practice and Procedure — Costs — Taxation — Getting up fee — R.S.C. 1957, 2nd Schedule, item 80.

Practice and Procedure — Costs — When entitled to.

Where the proceedings in an action have reached a stage when a hearing in open court is inevitable the legal advisers of the parties are entitled to be in readiness for the hearing and must be compensated for the work done irrespective of whether there was actually a hearing in open court or not.

On April 6, 1964 the plaintiff filed a writ in the High Court at Ipoh against the defendant claiming damages for personal injuries arising out of a motor accident. The writ was duly served and the defendant failing to enter appearance the plaintiff took out a motion for judgment in default of appearance returnable on July 20, 1964. The defendant entered appearance on July 16, 1964 and paid $4,000 into court in satisfaction of the plaintiff's claim. Consequently when the motion came on for hearing on July 20, 1964 an order was made on the motion but the court ordered that the costs to be costs in the cause.

On the taxing of the plaintiff's bill of costs the senior assistant registrar disallowed the claim for $500 for getting up in respect of the motion for judgment and also the claim for $850 for getting up generally. On appeal to the judge in chambers,

Held: (1) a getting up fee cannot be charged twice once for getting up on the motion and again for getting up the case generally;

(2) the case must be remitted to the senior assistant

registrar to assess the getting up fee for the case generally.

Cases referred to:—

(1) *Re Abu Bakar decd.* [1940] M.L.J. 4.

(2) *State of Selangor* v. *Kepong Dredging Co. Ltd.* [1932] M.L.J. 181; [1931-32] F.M.S.L.R. 293.

(3) *Chop Yoon Kee Hang* v. *Motor Union Insurance Co. Ltd.* [1932] M.L.J. 67.

(4) *Morse* v. *Frost* [1927] 1 K.B. 231, 234.

APPEAL FROM REGISTRAR.

Lim Kean Chye for the plaintiff.

Henry Chia for the defendant.

Cur. Adv. Vult.

MacIntyre J.: This is an appeal from the decision of the senior assistant registrar disallowing the claim under items 37 and 40 of the plaintiff's solicitor's bill of costs in Ipoh High Court Civil Suit No. 147 of 1964. Item 37 is a claim for a fee of $500 for looking up the law and considering authorities in respect of a notice of motion for entry of judgment and item 40 is a claim for a fee of $850 for looking up the law, considering authorities and getting up the case for trial of the action itself.

The course which the proceedings took in the case appear in the senior assistant registrar's grounds of decision as follows:—

"On 6th April, 1964, the plaintiff took out a general writ against the defendant claiming damages for personal injuries sustained as a result of the negligent driving of the defendant, the owner and driver of a motor lorry, on 22nd May, 1961 when the lorry collided with and knocked down the plaintiff as he was walking along the road. The writ was accompanied by a statement of claim set out on two pages which claimed general damages and $1,700 as special damages. The writ was served on the defendant on the 18th June 1964. On 2nd July, 1964, the plaintiff took out a certificate of non-appearance and on 8th July, 1964, he took out a notice of motion for judgment in default of appearance. The notice of motion was returnable on 20th July 1964. On 16th July 1964 the defendant entered appearance and on 20th July 1964 he paid into court a sum of $4,000 in satisfaction of plaintiff's claim. Consequently, as appearance had been entered, when the notice of motion came on for hearing on 20th July 1964 the plaintiff's counsel asked for no order upon it, and the court accordingly, made no order on the motion and further ordered the costs of the motion to be costs in the cause. On 28th July 1964 the plaintiff gave notice of acceptance of the amount paid into court in satisfaction of the claim. With that, the plaintiff became entitled, under Order 22 rule 2(3) to tax his costs up to the date of payment into court, that is, the 20th July 1964."

In disallowing the fee under item 37, the senior assistant registrar observed that there was no provision in the rules of the court which made a motion necessary to effect an entry of an interlocutory judgment and that in view of the provisions of rule 5 of Order 13 under which all that was required of the plaintiff was to submit "at the registry for sealing of a duly drawn up and fairly typed interlocutory judgment for damages to be assessed", the motion was misconceived; and he further commented that the costs payable by one party should not be allowed to be increased by the other party resorting to a procedure not sanctioned by the rules of the court.

The procedure for obtaining a final judgment in an action for damages for personal injury in default of entry of appearance is governed partly by the provisions of rule 5 of Order 13 of the court rules which would enable the plaintiff to establish his right to recover damages to be assessed by entry of an interlocutory judgment and partly by rule 11 of Order 27 read with rule 12 of Order 13 whereunder the plaintiff may set down the action on motion for judgment upon assessment of damages.

The notice of motion which is enclosure (4) in the court file reads as follows:—

"Take notice that this honourable court will be moved on Monday the 20th day of July, 1964, at 10.00 o'clock in the forenoon or so soon thereafter as counsel can be heard by counsel on behalf of the plaintiff on the default of the defendant in entering an appearance to the writ of summons herein and in delivering a defence in this action for judgment or an order for such relief as upon the plaintiff's statement of claim herein the court may consider the plaintiff entitled to."

It is clear from the notice of motion itself that what the plaintiff is praying is not for the entry of an interlocutory judgment but for a judgment or order for such relief he may be entitled to upon his statement of claim. The relief may well include an interlocutory judgment. It may be that the plaintiff was advised that the provisions of rule 5 of Order 13 are permissive and not mandatory, and that it is permissible to combine a prayer for an interlocutory judgment with a prayer for a final judgment in one application. Whatever may have been the advice given to the plaintiff, the combination of two prayers in one application is a step towards decreasing and not increasing the costs of the opposite party. The learned judge who dealt with the motion saw nothing wrong with the procedure and awarded the plaintiff costs in the cause knowing at that time that the action would be compromised and that the plaintiff would be entitled to tax his costs. In the circumstances, I do not think that at this stage the propriety of the procedure upon which the order for costs was made could be questioned either by me or the taxing master.

However, I shall not interfere with the decision of the senior assistant registrar disallowing the fee for getting up the motion under item 37 on the ground that a getting up fee cannot be charged twice, once under item 37 for getting up the motion and again under item 40 for getting up the case generally, since all the getting up that the plaintiff's solicitors were obliged to do on default of an entry of appearance was to procure the necessary evidence, attend upon

witnesses and consider the law in order to assist the court to assess the quantum of general damages. Besides in an action for damages for personal injury the plaintiff's solicitor will have perforce to consider the facts and law to determining whether the action should be brought in the High Court or a subordinate court and the costs thus incurred cannot be charged for work done in connection with a motion.

The getting up fee under items 37 and 40 in the bill of costs in this case is founded on Item 80 of the Second Schedule to the Rules of the Supreme Court, 1957 which reads as follows:—

"The registrar may allow a general fee for instructions for trial, for attendances upon witnesses, procuring evidence, considering authorities and getting up the case, having regard to all the circumstances. This fee may be allowed in respect of any hearing in open court whether under writ, motion, petition, originating summons, summons in chambers or upon an issue."

According to this rule, the fee may be allowed in respect of any hearing in open court whether under writ, motion, etc. In *Re Abu Bakar decd.*,[1] on an appeal from the decision of the Registrar of the Supreme Court of Penang, disallowing a getting up fee on the ground that there had been no trial of an issue in open court, Aitken J. held that "the true test to apply is not whether or not an issue has proceeded to trial, but whether or not a solicitor and advocate has acted reasonably and properly in getting up his client's case in readiness for a trial."

The principle established by this ruling is that where the proceedings is an action have reached a stage when a hearing in open court is inevitable the legal advisers of the parties are entitled to be in readiness for the hearing and must be compensated for the work done irrespective of whether there was actually a hearing in open court or not.

In *The State of Selangor* v. *Kepong Dredging Co. Ltd.*[2] Thorne Ag.C.J. held that under Item 3 of the Schedule of the 1929 F.M.S. Rules, the plaintiff's solicitors were not entitled to a getting up fee, since the pleadings had not been closed and issues joined and observed that "in my view, this item cannot be charged until the case has proceeded to such a stage that the plaintiff's advisers know what are the issues of fact and law to be debated at the trial. Usually that stage will not be reached until the pleadings have been closed, and as in this case the defendants had not filed their defence, I held that the item was not chargeable at all."

Item 3 of the Schedule of the 1929 F.M.S. Rules which has since been replaced by Item 80 of the 1957 rules, reads as follows:—

"The registrar may allow a general fee for consultation of authorities, attendance upon witnesses, procuring evidence, and getting up the case for trial or for appeal, having regard to all the circumstances."

And again in *Chop Yoon Kee Hang* v. *Motor Union Insurance Co. Ltd.*,[3] Murison C.J. said: "The registrar held that he never on principle allows a getting up fee where the case is not set down for trial. To do so would, he says, be tantamount to applying the getting up fee to the pleadings in an action and not for trial. It is not, he says, until a case is fixed for trial on a specified date that counsel proceed to get it up in detail." The learned Chief Justice then goes on to say: "I have consulted with my brother Terrell and he informs me that the regular practice in Penang is as stated by the registrar."

This view was based on an interpretation of Item 78 of Schedule C to the S.S. Civil Procedure Code of 1907 which was more or less similar to Item 3 of the F.M.S. Rules of 1929. However, the opinion that counsel should not proceed to get up the case until a specified date is fixed for the trial may be regarded as having been overruled by Aitken J. in *Re Abubakar decd., supra*, but I think that generally speaking the principle underlying the decision, namely, that the preparation of a case will not attract the provisions of the rule unless a trial or a hearing in open court is envisaged, still holds good although Item 3 of the 1929 F.M.S. Rules and Item 78 of Schedule C to the S.S. Civil Procedure Code of 1907 are now obsolete.

It must however be conceded that in certain cases an issue for trial may be present irrespective of whether the defendant enters appearance, delivers his defence or even admits liability. That may be deemed the reason why Thorne Ag.C.J. qualified his *dictum* by saying: "Usually that stage will not be reached until the pleadings have been closed."

In an action for damages for personal injury or for defamation, an issue for trial is present from the very inception of the action and Item 80 of the 1957 Rules also provide for a getting up fee in respect of any hearing in open court "upon an issue". I think this point has been well put by Bankes L.J. in *Morse* v. *Frost* [4] when he said:

"In this case a statement of claim has been delivered, but there has been no defence; so that the plaintiff may, if he likes, enter an interlocutory judgment;.... The statement of claim raises issues which are not disposed of. The amount of damages is in issue, and so are the facts on which special damages are founded. But even if no special damages were claimed there would be still an issue, because, although liability is admitted in the absence of a defence, the amount of damages is still in dispute."

I therefore remit the case to the senior assistant registrar to assess the getting up fee under item 40 of the bill of costs.

Order accordingly.

Solicitors: *Lim Cheng Ean & Co.; Allen & Gledhill.*